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In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM FRENCH SMITH, ET AL., PETITIONERS

v.

ANTHONY J. PRISCO, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether an order denying a claim of qualified immunity from liability in damages is an immediately appealable collateral order when the defendant is also named in his official capacity in a prayer for injunctive relief.

2. Whether a public official is entitled to qualified immunity from liability in damages when (a) he is alleged to have violated a constitutional right that has never been recognized by this Court and is the subject of disagreement among the circuits, and (b) he is alleged to have violated that right solely by virtue of having been the director of the responsible governmental agency.

PARTIES TO THE PROCEEDINGS

The plaintiff in this action is Anthony J. Prisco, Jr., who sued on his own behalf and on behalf of his daughter, Lauren Prisco. The defendants are William French Smith, Edwin Meese III, Stanley Morris, the United States of America, the Department of Justice, the United States Marshals Service, "unknown agents of the United States Marshal's Service," and Michael Morris. William French Smith, Edwin Meese III, and Stanley Morris are the petitioners in this Court.

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ANTHONY J. PRISCO, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of William French Smith, former Attorney General, Edwin Meese III, former Attorney General, and Stanley Morris, Director of the United States Marshals Service, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-12a) is reported at 851 F.2d 93. The opinion of the district court (App., *infra,* 15a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1988. A petition for rehearing was denied on August 24, 1988. App., *infra,* 13a-14a. On November 9, 1988, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including

December 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 501 and 502 of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Tit. V, 84 Stat. 922, 933-934 (codified at 18 U.S.C. note preceding 3481) (revised by the Witness Security Reform Act of 1984, 18 U.S.C. (Supp. IV) 3521-3528), provide as follows:

> Sec. 501: The Attorney General of the United States is authorized to provide for the security of Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.
>
> Sec. 502: The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

STATEMENT

In September 1983, the Senate Judiciary Committee found that "[i]t is a recognized fact that testifying in organized crime or narcotics cases involves a real danger of violent retaliation," because " '[t]ampering with witnesses is one of organized crime's most effective counter weapons.' " S. Rep. 98-225, 98th Cong., 1st Sess. 407, 408 (1983) (quoting S. Rep. 91-617, 91st Cong., 1st Sess. 59 (1969)). Thus, "[p]rotection by means of relocation to a safe environment is often necessary in such cases." *Id.* at 408. Those findings were nothing new. In 1970, Congress created the Federal Witness Protection Program as part of the Organized Crime Control Act of 1970, Tit. V, §§ 501-504, Pub. L. No. 91-452, 84 Stat. 922, 933-934 (codified at 18 U.S.C. note preceding 3481) (revised by the Witness Security Reform Act of 1984, 18 U.S.C. (Supp. IV) 3521-3528), in order to safeguard against retaliation witnesses (and their families) who testify about organized crime. See H.R. Rep. 91-1549, 91st Cong., 2d Sess. 33, 48 (1970); S. Rep. 91-617, *supra,* at 33, 59-60, 150. This case involves a claim by a natural parent that the placement of his child into the program, along with his former spouse and her present husband, violated his constitutional rights.

1. Petitioner married Maria Prisco in 1977, and their daughter Lauren was born three years later. In 1981, petitioner and Maria Prisco separated, and they were divorced in 1983. Maria received custody of Lauren, and respondent was entitled to "reasonable visitation rights according to terms which the parties may agree upon."[1] Maria then married Michael Morris in August 1983. Morris had been

[1] Stipulation, *Prisco* v. *Prisco*, No. 1554 (C.P. Philadelphia County, Family Div.) (referring to Agreement para. 4, at 3 (Dec. 12, 1982)).

cooperating with the Federal Bureau of Investigation (FBI) since November 1982 in a long-term investigation of an organized criminal group involved in the drug trade in the Philadelphia area. In August 1983, the FBI brought its investigation to a close, and the following month a federal grand jury indicted 14 members of the narcotics enterprise. In view of the danger to his family created by Michael Morris's cooperation with the FBI and his expected trial testimony, the FBI in August 1983 removed Morris, Maria, and Lauren to a secure location.[2] In October 1983, they were admitted into the Witness Protection Program, given new identitites, and relocated out of the Philadelphia area. App., *infra,* 3a.

Respondent was not informed of Lauren's admission into the Witness Protection Program. He retained an attorney and a private investigator in order to locate his daughter, and he learned from Michael Morris's lawyer in December 1983 that Lauren was living with the Morrises in the Witness Protection Program. Respondent thereafter filed a petition in the Pennsylvania Court of Common Pleas seeking custody of Lauren. The Marshals Service made the Morrises and Lauren available for these hearings. In late 1983, the Marshals Service also implemented a policy by which it would notify non-relocated parents that their children had entered the program.[3] Consistent with

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[2] Before Morris and his new family were admitted into the Witness Protection Program, the FBI prepared a "threat assessment," an evaluation of the violent nature of the people against whom a witness would testify, as well as associated criminal enterprises. C.A. App. 42a. Several of the individuals against whom Morris would testify had been convicted or suspected of murder and other violent crimes. C.A. App. 44a-46a, 53a-56a.

[3] Congress subsequently codified those policy changes in 1984. 18 U.S.C. (Supp. IV) 3521(c).

that policy, the Marshals Service informed respondent in December 1983 that he would be able to visit Lauren at government expense at a neutral site. Respondent thereafter participated in two such visits. App., *infra,* 3a-4a; C.A. App. 80a, 85a, 93a.

On June 29, 1987, the Pennsylvania Court of Common Pleas awarded primary custody of Lauren to respondent, but on October 2, 1987, its order was vacated by the Superior Court and the case was remanded for further proceedings. By that time, the Morrises and Lauren had left the Witness Protection Program, and respondent's state court custody suit resulted in a settlement providing for joint and shared custody between respondent and Maria Morris. App., *infra,* 4a. Maria Morris has since died, leaving respondent with legal custody over Lauren.

2. In 1985, respondent brought this action on his own behalf and on behalf of his daughter Lauren against petitioners, the United States, the Department of Justice, the Marshals Service, "Unknown Agents of the United States Marshal[s] Service," and Michael Morris, seeking declaratory and injunctive relief, as well as damages under *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971).[4] Petitioners were sued in both their official and individual capacities.[5] Respondent alleged that Lauren had been admitted into the Witness Protection Program and relocated from the Philadelphia area without his knowledge or consent,[6] that the defendants had participated in

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[4] Complaint paras. 4-11, 15, 37-51, at 2-4, 10-15 (C.A. App. 7a-8a, 9a, 16a-21a).

[5] Complaint para. 16, at 4 (C.A. App. 9a).

[6] *Id.* para. 24, at 6 (C.A. App. 11a).

the state court custody hearings,[7] and that the defendants had "permanently and totally" severed his relationship with his daughter through the operation of the Witness Protection Program.[8] Respondent made no specific

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[7] In this respect, the complaint alleged that (*id.* paras. 28-29, at 7 (C.A. App. 13a):

> 28. The defendants herein participated in all of the hearings on said Petition in that:
>
> a) They provided an attorney to represent the defendant, Michael Morris[,] and Maria Prisco Morris.
>
> b) Provided a United States Attorney who participated in said proceedings on behalf of the defendants herein.
>
> c) Presented and provided Federal Employees as witnesses against plaintiff.
>
> d) Provided the court with guidelines and limitations as to what the Defendant, United States Marshall [*sic*] Service[,] would allow concerning custody and visitation.
>
> e) Limiting and restricting the state court's normal procedures of investigation and decision making process.
>
> f) In otherwise acting and controlling the litigation for their own interests and against the interests of plaintiffs herein.
>
> 29. Said petition has not been decided by the state court and has been delayed by the conduct of the Defendants herein.

[8] In this respect, the complaint alleged that (*id.* para. 30, at 8 (C.A. App. 14a)):

> The defendants herein have totally and permanently severed the relationship between plaintiff Anthony J. Prisco, Jr. and his daughter, Lauren Prisco, in that they have prevented plaintiff from seeing his child, prevented him from having normal phone and in person visitation, preventing [*sic*] him from communicating with his child[,] prevented him from normal visitation with said child by imposing restrictive, burdensome and harrassing rules and regulations for visitation which make it impossible to comply with and cast plaintiff in a poor and derogatory light to his child, changed her name, concealed her whereabouts, changed her birth certificate to add defendant Michael Morris as her father, and changed her religion.

allegation against petitioners except to state that they are or were the heads of agencies that were also named as defendants.

3. Petitioners thereafter moved for summary judgment on the damage claims against them on the ground that they were entitled to qualified immunity under *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982). Petitioners argued that the decision to admit Lauren into the Witness Protection Program without first affording respondent notice or a hearing did not violate his clearly established constitutional rights, and that respondent did not allege in his complaint that petitioners were personally responsible for any action in this regard.[9] The district court denied the motion. App., *infra,* 17a-18a. Relying on two court of appeals decisions which were handed down a few months before Lauren was admitted into the Witness Protection Program and which recognized that a parent's visitation rights were constitutionally protected,[10] the court held that petitioners "have not established that the law was truly in a state of transition" at that time. *Ibid.*

4. Petitioners appealed the denial of their claim of qualified immunity. Although respondent had not raised the issue, the court of appeals (without calling for briefing) held that the denial of immunity to petitioners Meese and Morris was not appealable. App., *infra,* 5a-8a. The court acknowledged that *Mitchell* v. *Forsyth,* 472 U.S. 511 (1985), had ruled that a government official sued for damages can take an interlocutory appeal from the denial of a claim of qualified immunity. App., *infra,* 5a. The

[9] The government also moved for summary judgment on other grounds. The district court denied the motion (App., *infra,* 16a-17a, 18a), and those issues were not before the court of appeals.

[10] See *Ruffalo* v. *Civiletti,* 702 F.2d 710 (8th Cir. 1983); *Franz* v. *United States,* 707 F.2d 582, supplemented, 712 F.2d 1428 (D.C. Cir. 1983).

court distinguished *Forsyth,* however, on the ground that respondent had sought declaratory and injunctive relief as well as damages. *Ibid.* It reasoned that qualified immunity would not prevent respondent from obtaining such relief against petitioners Meese and Morris and that "[t]he part of the case that will determine liability must go forward in any event. The marginal benefits to a government official from an interlocutory review of a ruling that proof of damages should not be heard is so slight that it cannot outweigh the systemic harms from permitting piecemeal interlocutory review of discrete issues in a case which even against that official will be ongoing." *Id.* at 8a. Accordingly, the court dismissed the appeals taken by petitioners Meese and Morris without considering the merits of their qualified immunity claim. *Id.* at 12a.

At the same time, the court found that petitioner Smith "is in a different position," since he "is no longer a government official," respondent had not asserted "facts warranting any prospective relief against him," and "[h]e is a defendant only for the purpose of obtaining money damages from him." App., *infra,* 8a. The court therefore held that Smith could appeal the denial of his claim of qualified immunity under *Forsyth. Ibid.* Relying on the same two court of appeals decisions cited by the district court, the court concluded that petitioner Smith was not entitled to qualified immunity, because it was "clearly established" prior to Lauren's admission into the Witness Protection Program that respondent had the right to notice and a hearing on the question whether Lauren should be admitted into the program. *Id.* at 9a-12a. The court also held without discussion that it could not consider "the legal sufficiency of the pleadings." *Id.* at 12a.

5. Petitioners filed a petition for rehearing with a suggestion for rehearing en banc. The court of appeals denied the rehearing petition. Five judges dissented from the denial of en banc rehearing. App., *infra*, 13a-14a.

REASONS FOR GRANTING THE PETITION

1. By dismissing the appeals taken by petitioners Meese and Morris from the district court's denial of their qualified immunity claim, the court of appeals erroneously decided a question of considerable practical importance in a manner that expressly conflicts with the decisions of seven other courts of appeals on the precise question. As the five dissenting votes from the denial of en banc rehearing indicate, the jurisdictional question presented by this case is one that clearly must be resolved by this Court.

a. *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), held that an order denying a government official's claim of qualified immunity from a damages suit is an immediately appealable collateral order. *Forsyth* reasoned that the qualified immunity recognized by *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), is not merely a defense to liability but is an "entitlement" to "an *immunity from suit*" and thus "is effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526 (emphasis in original). *Forsyth* also noted that "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-528. Erroneously forcing a government official to stand trial, or even to undergo pretrial discovery, *Forsyth* stressed, would defeat the important policies served by qualified immunity, *i.e.*, avoiding the " 'distraction of officials from their governmental duties, inhibition of

discretionary action, and deterrence of able people from public service.' " *Id.* at 526 (quoting *Harlow,* 457 U.S. at 816).

Forsyth left open the question whether a public official can immediately appeal an order denying a claim of qualified immunity when the plaintiff has sought injunctive relief as well as damages. 472 U.S. at 519 n.5. Since then, eight courts of appeals, including the one below, have considered that question, and seven have expressly held that such an order is immediately appealable even though the case will go forward on the plaintiff's request for injunctive relief regardless of the resolution of the immunity issue. *De Abadia* v. *Izquierdo Mora,* 792 F.2d 1187, 1189-1190 (1st Cir. 1986); *Kennedy* v. *City of Cleveland,* 797 F.2d 297, 305-306 (6th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); *Scott* v. *Lacy,* 811 F.2d 1153, 1153-1154 (7th Cir. 1987); *Drake* v. *Scott,* 812 F.2d 395, 398, supplemented on rehearing, 823 F.2d 239 (8th Cir. 1987), cert. denied, No. 87-587 (Nov. 30, 1987); *DeVargas* v. *Mason & Hanger-Silas Mason Co.,* 844 F.2d 714, 717-718 (10th Cir. 1988); *Young* v. *Lynch,* 846 F.2d 960, 961-963 (4th Cir. 1988)[11]; *Marx* v. *Gumbinner,* 855 F.2d 783, 786-788 (11th Cir. 1988).[12] Moreover, the Elev-

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[11] In *Young* v. *Lynch,* the Fourth Circuit, relying on *Forsyth,* overruled its earlier decisions holding that a defendant cannot immediately appeal the denial of a qualified immunity claim if the plaintiff has also sought injunctive relief. 846 F.2d at 961-963 (overruling *England* v. *Rockefeller,* 739 F.2d 140 (4th Cir.), cert. denied, 469 U.S. 948 (1984), and *Bever* v. *Gilbertson,* 724 F.2d 1083 (4th Cir.), cert. denied, 469 U.S. 948 (1984).

[12] See also *Musso* v. *Hourigan,* 836 F.2d 736, 742 n.1 (2d Cir. 1988) (relying on the line of circuit court decisions cited in the text to find appellate jurisdiction over the denial of a qualified immunity claim where the defendant was subject to a trial for damages on other grounds); *Bolden* v. *Alston,* 810 F.2d 353, 356-357 (2d Cir. 1987),

enth Circuit in *Marx* v. *Gumbinner* expressely rejected the holding and reasoning of the Third Circuit in this case. 855 F.2d at 787-788.[13] Only the Third Circuit has held that a plaintiff's request for injunctive relief deprives an order denying a public official's claim of qualified immunity of the finality necessary to permit an immediate appeal.

b. The Third Circuit's holding is also incorrect. It held that the district court's order was not appealable under *Forsyth* since the case would go forward on respondent's prayer for injunctive relief even if petitioners Meese and Morris were found to be entitled to qualified immunity from damages. App., *infra,* 8a. But a government official named as a defendant in an action for injunctive relief is essentially a defendant in name only, a surrogate for the agency he directs. "As a practical matter a public official who is a defendant in a suit seeking an injunction is not 'on trial' at all." *Scott*, 811 F.2d at 1153. The officer "need not attend the trial, which will be conducted by attorneys representing the governmental body," and "[i]f he leaves office during the interim, he leaves the case behind and his successor become the party." *Id.* at 1154. See Fed. R. Civ.

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cert. denied, No. 87-119 (Oct. 13, 1987) (upholding appellate jurisdiction when the district court had resolved the defendant's qualified immunity claim and the merits of the plaintiff's claims, but had not yet ruled on the plaintiff's request for injunctive relief); *Brown* v. *Texas A&M Univ.*, 804 F.2d 327, 331-332 (5th Cir. 1986) (relying on *Forsyth* to uphold appellate jurisdiction over the defendant's appeal from the denial of qualified immunity in an action under 42 U.S.C. 1983 even though the defendant was also sued in his official capacity under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and that claim would proceed to trial).

[13] Although *Marx* v. *Gumbinner* involved a claim of absolute rather than qualified immunity, the Eleventh Circuit did not distinguish between the two claims for purposes of appellate jurisdiction.

P. 25(d)(1); Fed. R. App. P. 43(c)(1); Sup. Ct. R. 40.3; *Brandon* v. *Holt,* 469 U.S. 464, 470-471 (1985). A public official sued in his official capacity "will simply be ordered by the court to do something, at the state's expense, in his official capacity" if he loses, whereas an unsuccessful defendant in a damages suit "will be liable in his *personal* capacity for a monetary payment of some amount," and "even if he ultimately prevails in an appeal from final judgment, his personal assets will be subject to attachment pending the appeal unless he posts, at his own expense, a supersedeas bond." *Marx,* 855 F.2d at 787-788 (emphasis in original). See *Kentucky* v. *Graham,* 473 U.S. 159, 165-167 (1985). "[T]he threat of exposure" to a damages action, as contrasted with a suit for injunctive relief, "is much more likely to have the effect of dampening the ardor with which the individual carries out his official functions." *Marx,* 855 F.2d at 788. Accord *DeVargas,* 844 F.2d at 718. And, as the First Circuit has warned, denying interlocutory appellate review simply because the plaintiff has sought equitable relief "might invite plaintiffs to include spurious injunctive claims to avoid interlocutory appeal of the immunity question, and thus force the defendant to face the tribulations of a trial from which he may be properly immune." *De Abadia,* 792 F.2d at 1190. Accord *Young,* 846 F.2d at 962; *DeVargas,* 844 F.2d at 717-718; *Scott,* 811 F.2d at 1154 ("The rule concerning jurisdiction affects the number of requests for injunctions; we cannot simply assume that the way the plaintiff frames his claims is exogenous."); *Kennedy,* 797 F.2d at 306.

For all of these reasons, "the entitlement to be free from suit on a claim for money damages is, in the context of a suit against a government official, conceptually distinct from an entitlement to be free from suit on a claim for injunctive relief." *Marx,* 855 F.2d at 788. And once that principle is accepted—as this Court did in *Forsyth,* 472

U.S. at 527-528—"the rationale underlying the Third Circuit's rule breaks down," while "the policy reasons for according the government official immunity to suit for money damages—and hence the reasons for allowing an immediate appeal if immunity is denied—remain." *Marx*, 855 F.2d at 788. The decision below will therefore frustrate the important public policies that this Court strove to protect in *Forsyth*.[14]

2. The court of appeals' ruling that petitioner Smith is not entitled to qualified immunity also warrants review by this Court. That ruling misconstrued the *Harlow* standard in two principal respects. First, the court gave no weight to compelling evidence that the relevant law was in flux, indicating that there was no violation of a "clearly established" constitutional right. Second, it refused even to consider whether respondent had alleged any action by petitioner Smith (or the other petitioners) that would constitute a violation of the right asserted by respondent.

a. This Court held in *Harlow* v. *Fitzgerald* that an official's entitlement to qualified immunity is measured by reference to the " 'objective legal reasonableness' " of his action, which is to be "assessed in light of the legal rules that were 'clearly established' at the time it was taken." 457 U.S. at 818. While no precise formula has evolved for

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[14] The court of appeals' ruling is erroneous for another reason. We have been informed by the Marshals Service, and we stated in our opening brief in the court of appeals, that Lauren is no longer a participant in the Witness Protection Program. Appellants C.A. Br. 4. Petitioner's prayer for declaratory and injunctive relief is therefore moot, which eliminates the sole ground given by the Third Circuit for distinguishing this case from *Forsyth*. Although we brought that fact to the attention of the court of appeals in our opening brief and in our petition for rehearing and suggestion for rehearing en banc (at 8 n.3), the court made no mention of it in its decision, and denied our rehearing petition without comment.

determining when a right is "clearly established," the Court has emphasized that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," and that "in the light of preexisting law the unlawfulness must be apparent." *Anderson* v. *Creighton,* No. 85-1520 (June 25, 1987), slip op. 4, 5.[15] In this case, when Lauren Prisco and her mother were admitted into the Witness Protection Program, neither this Court nor the Third Circuit had addressed the rights of third-party parents whose children are admitted into that program, and the decisions of the three courts of appeals that had considered this subject revealed conflict and uncertainty, not an established consensus. Accordingly, this case presents a classic instance of the situation envisioned by *Harlow* in which a public official cannot be held personally liable.

In *Leonhard* v. *Mitchell,* 473 F.2d 709, 711-712 (2d Cir.), cert. denied, 412 U.S. 949 (1973) (*Leonhard I*), a divorced, noncustodial parent sought mandamus relief to compel disclosure of the location and new identities of his children, who, along with their mother and her new spouse, had been accepted into the Witness Protection Program without prior notice to the plaintiff. The plaintiff claimed that "the secretive relocation of his children violated his constitutional rights" as well as a state court custody order granting him visitation rights. The Second Circuit sustained the district court's denial of mandamus, ruling that there was no "clear constitutional right to

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[15] See also *Malley* v. *Briggs,* 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *Forsyth,* 472 U.S. at 528 (officials are entitled to immunity unless "the law clearly proscribed the actions" they took); *Harlow,* 457 U.S. at 818 (officials are not required "to anticipate subsequent legal developments," nor must they know that "the law forbade conduct not previously identified as unlawful").

custody or visitation" (473 F.2d at 713) and that the responsible official, rather than having abused a discretionary power, acted in good faith in attempting to balance the competing interests. *Id.* at 714. In fact, the court added that the difficulty of the decision "calls for the wisdom of Solomon." *Ibid.*

Leonhard v. *United States*, 633 F.2d 599 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981) (*Leonhard II*), was a damages action stemming from *Leonhard I*, in which the plaintiff asserted that the government's actions violated his children's constitutional rights.[16] The Second Circuit again ruled against the plaintiff, holding that "the federal officials' removal and concealment of the children on the consent of their mother and sole custodian, did not violate the children's constitutional rights." 633 F.2d at 620. The court found that the case did not involve "a governmental rupture of the family unit," because that event had occurred when the children's parents had divorced. *Id.* at 619. Moreover, the court pointed out that "[t]he most critical fact in determining whether the rights of the children were violated is the fact that [their mother] had sole custody of them," because "[i]t is to be presumed that she was properly concerned for their welfare." *Ibid.* (citing *Parham* v. *J.R.*, 442 U.S. 584, 602-603 (1979) (parents are presumed to act in the best interests of their children)). The Second Circuit also held that "[t]he fact that the decision was made by only one parent rather than both is of no legal consequence since custody resided solely with the consenting parent." *Ibid.* (footnote omitted).[17]

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[16] The father's damage claims in *Leonhard II* were dismissed as time-barred. 633 F.2d at 612-615.

[17] The court was also dubious that either a pre- or post-relocation hearing was required by due process (633 F.2d at 620):

> Indeed, considering the uncivilized nature of the risks against which the removal and concealment of the children sought to for-

In 1983, shortly before Lauren and her mother were admitted into the Witness Protection Program, two other court of appeals dealt with this matter. In *Ruffalo* v. *Civiletti,* 702 F.2d 710 (8th Cir. 1983), a child and one natural parent were admitted into the Witness Protection Program without affording the other, custodial parent notice and a hearing. The Eighth Circuit held that the relationship between a custodial parent and her child enjoyed constitutional protection. The court relied explicitly on the plaintiff's right to custody as the basis for her constitutional right, and it declined to decide whether a state law right to visitation would give rise to a similar constitutional right. *Id.* at 714-715. In so ruling, however, the Eighth Circuit explicitly stated that "[w]e can readily agree with the Marshals Service that *advance* notice of a person's being taken into the program need not be given," because

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fend, it is difficult to envision the possibility of a hearing, either before or after the fact, which would be "useful[ ] . . . in the given circumstances," and which would not entail "adverse consequences." *See* Friendly, *"Some Kind of Hearing",* 123 U. Pa. L. Rev. 1267, 1278 (1975). If a hearing had been held prior to the removal and concealment of the children, and [the new husband and former member of organized crime] either remained willing to testify or the alleged criminals believed, even erroneously, that there remained any possibility that he would testify, the children would be exposed to the danger of abduction or other harm as leverage against [that person] to prevent his testimony. A hearing after [that person] testified could hardly be more meaningful since it would expose the children to the danger of retaliatory acts, undoubtedly designed in part to discourage other potential witnesses against organized crime. And * * * for the government officials to reveal the whereabouts of the children after testimony has been given and before the officials feel the dangers have abated would be the very essence of bad faith. We are thus compelled to conclude that due process did not require a hearing on the decision by [the children's mother] and the government officials on the decision to conceal the children.

"[t]hat would destroy the whole premise of secrecy on which the Program is based." *Id.* at 715 (emphasis in original). A "post-deprivation" hearing would be sufficient. *Ibid.*

Finally, in *Franz* v. *United States,* 707 F.2d 582, supplemented, 712 F.2d at 1428 (1983), a divided panel of the District of Columbia Circuit held that a cause of action was stated by the plaintiff's allegations that the placement of his child in the Witness Protection Program had acted "*to sever totally and permanently* the relationships between a non-custodial parent and his minor children without their participation or consent." 707 F.2d at 585 (emphasis in original). At the same time, the court also stated that even in circumstances involving final termination of the parent-child relationship, a pre-placement hearing would not always be required. 707 F.2d at 602, 608-609; 712 F.2d at 1432. In dissent, Judge Bork criticized the majority's holding, stating that the majority had unnecessarily created "a new constitutional right" and had "invent[ed] a new procedure to protect it" and noting that "[t]he right is dubiously grounded and the procedure protects very little." 712 F.2d at 1434.

In sum, at the time that Lauren Prisco and her mother were admitted into the Witness Protection Program, one court of appeals (*Leonhard I* and *Leonhard II*) had expressly ruled that a noncustodial parent had no clearly established due process right to custody or visitation and that the interests of the relocated children were adequately protected by the participation of the custodial parent. A second court of appeals (*Ruffalo*) had ruled that the *custodial* parent is entitled to a post-relocation hearing and had specifically rejected the requirement of advance notice or a hearing. Thus, only one divided court of appeals (*Franz*) had ruled that placing a child of a noncustodial parent into the Witness Protection Program without prior notice to or a hearing for that parent could

violate his due process rights, and that court expressly limited its ruling to cases (unlike the present one) in which the noncustodial parent was totally and permanently denied any opportunity for visitation. Respondent's claim that he, a noncustodial parent with visitation rights, was entitled to notice and a hearing prior to his daughter's admission into the Witness Protection Program, therefore, was not "clearly established" (*Harlow*, 457 U.S. at 818) or "apparent" (*Anderson*, slip op. 5) in August or October of 1983.[18]

The court of appeals rejected petitioner's Smith's immunity claim for two reasons, neither of which is persuasive. First, it erroneously dismissed as dictum the Second Circuit's conclusion in *Leonhard I*, 473 F.2d at 713, that a noncustodial parent had no "clear constitutional right to custody or visitation rights." App., *infra*, 11a.

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[18] Two courts of appeals have explicitly recognized that a divergence of views *within* a circuit establishes an entitlement to qualified immunity. *McSurely* v. *McClellan*, 753 F.2d 88, 99-100 & n.8 (D.C. Cir.), cert. denied, 474 U.S. 1005 (1985) (a 5-5 split by the en banc court on a question establishes the existence of a complex issue and entitles a public official to qualified immunity); *Harris* v. *Young*, 718 F.2d 620, 624 (4th Cir. 1983) (the law is not "clearly established" under *Harlow* "when a federal Circuit Court of Appeals was unable to unanimously decide the same issue"); *Ward* v. *Johnson*, 690 F.2d 1098, 1112 (4th Cir. 1982) (en banc) (a defendant is entitled to qualified immunity when he followed one of two inconsistent decisions issued by the same circuit). It follows that a similar disagreement *among* the circuits should also entitle a public official to qualified immunity. A contrary ruling would eviscerate the *Harlow* standard by exposing government officials to personal liability when they are required to make difficult decisions in an area of evolving and conflicting law. Denying a public official qualified immunity in those circumstances would severely impair the government's ability to litigate a difficult issue in other courts of appeals (or, indeed, in this Court) once it first receives an adverse appellate decision on an issue. Cf. *United States* v. *Mendoza*, 464 U.S. 154 (1984).

That conclusion was not dictum; it was critical to the court's holding that it could not order the Attorney General to disclose the whereabouts of the plaintiff's children.[19] Second, the court of appeals found that *Quilloin* v. *Walcott*, 434 U.S. 246 (1978), and *Santosky* v. *Kramer*, 455 U.S. 745 (1982), had undermined *Leonhard I*. App., *infra*, 11a. That conclusion is also erroneous. Neither case involved the unique circumstances of the Witness Protection Program, in which the government does not attempt to dissolve the family unit or terminate parental rights, but to safeguard family members from death or serious bodily injury. Moreover, in relocating Lauren the government relied on the judgment of the parent who was awarded custody over Lauren by a state court and who was presumably acting in Lauren's best interests. *Leonhard II*, 633 F.2d at 619; see *Parham* v. *J.R.*, 442 U.S. at 602-603. Accordingly, the relevant question under *Anderson* v. *Creighton* is whether a reasonable official could have believed that relocating a custodial parent and her child into the Witness Protection Program without first informing the child's noncustodial parent violated that person's due process rights. Slip op. 6 (the inquiry under *Harlow* is necessarily "fact specific"). *Quilloin* and *Santosky* did not answer that question.

b. The courts below also erred in failing to dismiss the damages claim against petitioner Smith for another reason. Repondent did not allege in his complaint that petitioner Smith took any action that violated the law, nor did respondent assert that petitioner Smith had any per-

[19] See also *Leonhard II*, 633 F.2d at 605 (quoting *Leonhard I*, 473 F.2d at 713) ("[t]his Court held [in *Leonhard I*] that Leonhard had no 'clear constitutional right to custody or visitation rights' and that [a government official's] refusal to disclose the whereabouts of the children was a rational exercise of his discretion, making mandamus inappropriate.").

sonal knowledge of or involvement in the alleged unlawful conduct. Respondent simply asserted that petitioner Smith was the Attorney General in 1983 and therefore was the supervisor of the persons who allegedly violated respondent's due process rights. Pages 6-7, *supra.*[20] Requiring a present or former cabinet officer to stand trial for damages or to undergo pretrial discovery simply because he is alleged to have held office during the period in which an alleged constitutional violation occurred undercuts the basic purposes of qualified immunity. Indeed, lack of personal involvement in the events in suit presents at least as strong a case for protection against the ordeal of litigation as does the existence of reasonable grounds for believing that the actions taken were within the law. As this case shows, whenever a federal agency is sued, a plaintiff would need only add a claim for damages and injunctive relief against the head of the agency to impose on him the burdens and disruptions of discovery and trial. By failing to distinguish a public official from the agency that he supervises, that approach ignores the difference between an action for damages and one for injunctive relief—a difference that lies at the heart of the inquiry required by *Harlow* and *Anderson.*

The refusal of the court of appeals to consider the sufficiency of the pleadings as part of petitioner Smith's claim

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[20] Although the immunity claims raised by petitioners Meese and Morris were not considered by the court of appeals, respondent's complaint also fails to allege that they took any personal action in this regard. Petitioner Meese did not even become Attorney General until two years *after* the events found by the court of appeals to violate respondent's clearly established rights. 470 U.S. III-IV & n.2 (1985). Petitioner Morris did not become director of the Marshals Service until October 1983, after Lauren Prisco had been relocated by the FBI. Although petitioner Morris became Director of the Marshals Service approximately at the time that Lauren was accepted into the Witness Protection Program, there is no basis in respondent's allegations for holding him personally liable for the alleged due process violation.

of qualified immunity in this regard conflicts with the decisions of other courts of appeals. Indeed, in identical circumstances the Second Circuit held in *Leonhard II* that the federal defendants, including then-Attorney General Bell, were properly dismissed, because "they were not alleged to have participated personally in the removal and concealment of the children." 633 F.2d at 621 n.30. The Second Circuit stressed that "[p]ublic officials may be held responsible only to the extent that they caused the plaintiff's rights to be violated; they cannot be held liable for violations committed by their subordinates or predecessors in office." *Ibid.* Other courts of appeals have also ruled that a government official cannot be held liable under *Bivens* unless the official was personally responsible for the allegedly unconstitutional conduct. *E.g., Mullen* v. *Smith*, 738 F.2d 317, 318 (8th Cir. 1984) (respondeat superior does not apply in *Bivens* actions); *Lojuck* v. *Quandt*, 706 F.2d 1456, 1468 (7th Cir. 1983); see generally *Tarpley* v. *Greene*, 684 F.2d 1, 9-11 (D.C. Cir. 1982) (collecting cases).[21] Similarly, to implement the policies of *Harlow*, the District of Columbia and Fifth Circuits have required plaintiffs to plead their claims with some level of specificity, instead of resting on conclusory allegations, in order to withstand a motion for dismissal on qualified im-

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[21] "Analytically, high-level public officials are not employers of their subordinates but rather are fellow governmental servants, and it is thus inappropriate to hold them liable on the basis of respondeat superior." *Haynesworth* v. *Miller*, 820 F.2d 1245, 1259 (D.C. Cir. 1987). In addition, holding a high-level public official liable for wrongs committed by subordinates "would paralyze the public service. Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person." *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888).

munity grounds. See *Martin* v. *Malhoyt*, 830 F.2d 237, 257 (D.C. Cir. 1987) ("conclusory allegations of unconstitutional or otherwise illegal conduct will not withstand a public official's dispositive pretrial motion"); *Brown* v. *Texas A&M Univ.*, 804 F.2d 327, 333 (5th Cir. 1986) (a "plaintiff must plead specific facts with sufficient particularity to meet all the elements necessary to lay a foundation for recovery, including those necessary to negative the defense of qualified immunity").[22] Because respondent alleged nothing more than that petitioner Smith had supervised the Department of Justice during the relevant period, the ruling below conflicts with these decisions.

The court of appeals apparently declined to consider the sufficiency of the allegations in respondent's complaint on the ground that that issue could not be considered on appeal from the district court's ruling. App., *infra*, 12a. *Harlow* and *Anderson* made clear, however, that a plaintiff must allege that a public official has violated a clearly established constitutional right to withstand dismissal on qualified immunity grounds (see *Anderson*, slip op. 11 n.6; *Harlow*, 457 U.S. at 817), and *Forsyth* held that the denial of a such a claim is immediately reviewable on appeal. In sum, public officials are entitled to qualified immunity insofar as "*their conduct*" does not violate the plaintiff's clearly established rights (*Harlow*, 457 U.S. at 818 (emphasis added)), and "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Forsyth*, 472 U.S. at 526. Because the court of appeals' decision misconstrues the nature of qualified immunity and is inconsistent with the decisions of other courts of appeals, review by this Court is clearly warranted.

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[22] See also *Owens* v. *United States*, 822 F.2d 408, 412 (3d Cir. 1987) (remanding claims since no informed decision regarding immunity could be made in the absence of more specific allegations).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-1708

ANTHONY J. PRISCO, JR., INDIVIDUALLY AND ANTHONY J. PRISCO, JR. AS PARENT AND NATURAL GUARDIAN OF LAUREN PRISCO, A MINOR, APPELLEES

v.

UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, FORMER U.S. ATTORNEY GENERAL WILLIAM FRENCH SMITH, IN HIS CAPACITY AS ATTORNEY GENERAL AND INDIVIDUALLY, ATTORNEY GENERAL EDWIN MEESE, IN HIS CAPACITY AS ATTORNEY GENERAL AND INDIVIDUALLY, UNITED STATES MARSHAL SERVICE, STANLEY MORRIS, IN HIS CAPACITY AS UNITED STATES MARSHAL SERVICE DIRECTOR AND INDIVIDUALLY, UNKNOWN AGENTS OF THE UNITED STATES MARSHAL SERVICE AND MICHAEL MORRIS, APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 85-6739)

Argued: May 5th, 1988
Before: GIBBONS, *Chief Judge*,
MANSMANN and COWEN, *Circuit Judges*

(Opinion filed: July 1, 1988)

OPINION OF THE COURT

GIBBONS, Chief Judge:

This is an appeal pursuant to 28 U.S.C. § 1291 (1982) by Edwin Meese, Attorney General, William French Smith, former Attorney General, and Stanley Morris, Director of the United States Marshals Service, from an order denying their motion for summary judgment. The suit is by Anthony J. Prisco, Jr., the father of Lauren Prisco, a minor. It seeks declaratory and injunctive relief, and money damages, against Meese, Smith, and Morris, and against other defendants including the United States. The action arises from the placement and maintenance of Lauren in the Federal Witness Protection Program, along with her mother and stepfather, without notice to Prisco.

The United States moved for summary judgment on Prisco's Federal Tort Claims Act claim on the ground that he had not filed an administrative claim. That motion was denied, and the order is not presently appealable. Prisco's claim for injunctive relief has not been ruled upon. Thus there is no order appealable under 28 U.S.C. § 1292(a) (1982). No order has been certified for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (Supp. III 1985). Meese, Smith and Morris moved for summary judgment on two grounds: 1) qualified official immunity, and 2) failure to allege acts by them which violated Prisco's rights. They contend that because the district court rejected their qualified immunity defense they may appeal at this time because the order appealed from is collaterally

final. They contend, as well, that the court erred in failing to dismiss on qualified immunity grounds.

We conclude that the appeals of Meese and Morris should be dismissed, and that the order denying Smith's motion, while appealable, should be affirmed.

I

Anthony Prisco married Maria Prisco in 1977. On February 14, 1980 they had a daughter, Lauren. Shortly after Lauren's birth the Priscos separated and on March 18, 1983 they were divorced. In December of 1982 they had entered into an agreement granting custody of Lauren to Maria and reasonable visitation rights to Anthony. Both before and after the divorce Anthony exercised those visitation rights regularly. On August 7, 1983 Maria married Michael Morris. This stepfather of Lauren had been cooperating, prior to the marriage, with a Federal Bureau of Investigation inquiry into an organized crime group involved in the drug trade. The investigation resulted, on September 19, 1983, in a federal grand jury indictment of fourteen members of the group. Prior to the return of the indictment the Federal Bureau of Investigation removed Michael Morris, Maria and Lauren from the Philadelphia area to a secure location. Anthony Prisco was not informed of the move. In October the Morrises were admitted to the Federal Witness Protection Program authorized by 18 U.S.C. §§ 3521-28 (Supp. IV 1986). The United States Marshals Service moved them to a new home and gave them new identities.

Prisco was not informed that Lauren was in the Witness Protection Program. He retained a lawyer and a private investigator in an effort to locate his daughter. On December 5, 1983 the efforts of the investigator resulted in the disclosure by Michael Morris that Prisco's daughter was

with the Morrises in the Witness Protection Program. Anthony Prisco then filed a petition in the Court of Common Pleas of Philadelphia County seeking full custody of Lauren. The Marshals Service made Michael Morris, Maria, Lauren, and various federal employee witnesses available for hearings in the Court of Common Pleas, and permitted a court social worker to make a home visitation in the secret relocation area. The Marshals Service also offered to permit Anthony Prisco to make visits with his daughter at government expense at a neutral site selected and secured by it. Prisco participated in two such visits, but alleges that they were of poor quality from the standpoint of a parent, because of the distance traveled, the tight security, and limits on what he and Lauren could discuss.

The Court of Common Pleas on June 29, 1987 awarded primary custody to Anthony Prisco. On October 2, 1987 the Superior Court of Pennsylvania vacated that order and remanded for further proceedings. At that point Anthony and Maria agreed to share primary custody, and an order was entered to that effect by the Court of Common Pleas on October 16, 1987.

Meanwhile, on November 21, 1985 Anthony Prisco had filed the instant action in the United States District Court, alleging that the action of the defendants in placing Lauren in the Witness Protection Program without notice to him violated rights secured by Pennsylvania law and by the due process clause of the fifth amendment. The United States Attorney, appearing for the United States and the federal officer defendants, moved for summary judgment on July 24, 1986. The court granted an extension of Anthony Prisco's time to respond to that motion, and on October 15, 1987 denied it. As noted above, the motion was predicated both on the adequacy of the factual allegations, and on the defense of qualified official immunity.

II

The order denying a motion for summary judgment is interlocutory, and thus not ordinarily appealable on the authority of 28 U.S.C. § 1291. The United States Attorney concedes, therefore, that the United States may not appeal at this time. It is contended, however, that Edwin Meese, William French Smith, and Stanley Morris may appeal at this time from the order denying their summary judgment motion because it rejects their claim for qualified official immunity. They rely on *Mitchell v. Forsyth*, 472 U.S. 511 (1985) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) for the proposition that a denial of a motion for summary judgment on official immunity grounds falls within the exception to the final judgment rule for orders that are collaterally final.

The issue of appealability is more complex than the appellants recognize, however, because in this case Prisco's complaint seeks both prospective (injunctive and declaratory) and retrospective (money damages) relief. The defense of qualified official immunity, like the defense of absolute judicial or official immunity, is inapplicable to claims for prospective relief. Neither immunity defense has ever, either in the Supreme Court or in this Court, been held to apply to such a claim.[1] The controlling prece-

[1] Qualified immunity has uniformly been applied in cases seeking money damages, not prospective relief. *See, e.g., Anderson v. Creighton*, 107 S. Ct. 3034, 3038 (1987) (qualified immunity shields official from "civil damages liability"); *Mitchell v. Forsyth*, 472 U.S. 511, 513 (1985) (suit for damages); *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982) (same); *Hynson By and Through Hynson v. City of Chester*, 827 F.2d 932, 934-35 (3d Cir. 1987) (same), *cert. denied*, 108 S. Ct. 702 (1988); *Bennis v. Gable*, 823 F.2d 723, 732 (3d Cir. 1987) (same); *Sourbeer v. Robinson*, 791 F.2d 1094, 1103 (3d Cir. 1986) (same), *cert. denied*, 107 S. Ct. 3276 (1987); *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 143 (3d Cir. 1984) (same).

dents are *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 584 (1952) (affirming preliminary injunction against cabinet official) and *Ex parte Young,* 209 U.S. 123, 155-56 (1908) (injunction against enforcement of unconstitutional act by state official). As the Supreme Court explained in *Harlow v. Fitzgerald*:

> [O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.

457 U.S. at 806. Thus the policy rationale for qualified immunity is that we do not want officials to make discretionary decisions with one wary eye on their pocketbook. *See Hicks v. Feeney,* 770 F.2d 375, 379 (3d Cir. 1985) ("Qualified immunity from suits for civil damages brought under § 1983 is a common law immunity that balances the need to compensate and to vindicate the rights of victims of constitutional torts with a concern that too broad a liability may cause public officials to refrain unnecessarily from discretionary decisions."). That policy rationale is not applicable to a suit for injunctive relief. An official acting in violation of the law may in some instances be appropriately shielded from the threat of money damages recovery, but the policy reasons for such a shield do not confer discretion to continue acting illegally. Extending immunity so as to confer a freedom from civil process seeking prospective relief would have that effect.

The paradigm example in this respect is the earliest of the immunity doctrines, judicial immunity. That doctrine originated in *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 351, 357 (1871), which held that a judge was absolutely immune from a suit for money damages brought by a dis-

barred attorney. At the same time, however, the Supreme Court ordered that a preemptory writ of mandamus must issue against the judges of the Supreme Court of the District of Columbia to restore the same attorney to the roll. *Ex Parte Bradley,* 74 U.S. (7 Wall.) 364, 379 (1868). The long settled law with respect to the distinction, for immunity purposes, between suits for money damages and suits for prospective relief is set forth in detail in *Conover v. Montemuro,* 477 F.2d 1073, 1094-1104 (3d Cir. 1973) (Gibbons, J., concurring in denial of rehearing). It need not be repeated here.

It is clear, therefore, that a suit seeking both prospective relief and money damages will not end for a party successfully asserting a defense of either absolute or qualified immunity. That being the case, it is necessary to consider the rationale for the *Mitchell v. Forsyth—Harlow v. Fitzgerald* exception to the final judgment rule. That rationale is that the *collateral* interest being protected is the freedom from having to defend a lawsuit; this interest, like a claim of double jeopardy, is lost beyond recall even if the defendant prevails at trial. As the *Mitchell* Court explains:

> *Harlow* . . . recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable; in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

472 U.S. at 526-27 (emphasis in original)); *see also Chinchello v. Fenton*, 805 F.2d 126, 130 (3d Cir. 1986). That rationale has only the slightest application to a case involving claims for both prospective relief and money damages. The part of the case that will determine liability must go forward in any event. The marginal benefit to a governmental official from an interlocutory review of a ruling that proof of damages should not be heard is so slight that it cannot outweigh the systemic harms from permitting piecemeal interlocutory reivew of discrete issues in a case which even against that official, will be ongoing. We hold, therefore, that in an action in which claims for prospective relief remain pending, a party against whom they remain pending may not appeal from the denial of a motion for summary judgment on immunity grounds.[2] This holding applies to the appeals of Edwin Meese and Stanley Morris, because Anthony Prisco's claims for prospective relief have not yet been ruled upon.

III

William French Smith, however, is in a different position. Smith is no longer a governmental official, and we have examined the complaint carefully to determine whether any of its allegations would permit proof of facts warranting any prospective relief against him. There are no such allegations. He is a defendant only for the purpose of obtaining money damages from him. Thus he may appeal from the denial of his motion for summary judgment on qualified immunity grounds, and we must address the merits of that order.

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[2] In *Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1306 (3d Cir. 1987) this Court considered an immunity question in an interlocutory appeal although claims for injunctive relief remained. The district court, however, had certified its order pursuant to 28 U.S.C. § 1292(b). There is no such certification in this case.

Smith contends that while Prisco may have a right to a due process hearing before his parental rights are terminated, that right was not clearly established at the time he and the other federal defendants placed Lauren in the Witness Protection Program. High government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 107 S. Ct. 3034, 3039 (1987). In exploring whether a right is clearly established, we must find "some but not precise correspondence" with applicable precedents. *People of Three Mile Island v. Nuclear Regulatory Comm'rs,* 747 F.2d 139, 144 (3d Cir. 1984). "Although officials need not 'predic[t] the future course of constitutional law.' . . . they are required to relate established law to analogous factual settings." *Id.* (citation omitted).

The question in this case is whether a father has a right to notice and an opportunity to be heard before his daughter is placed in the Witness Protection Program. In a long line of cases extending over sixty-five years, the Supreme Court has held that the parent-child relationship is protected as a matter of substantive due process. *E.g., Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978); *Moore v. City of East Cleveland,* 431 U.S. 494, 499 (1977); *Stanley v. Illinois,* 405 U.S. 645, 651-52 (1972); *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); *Meyer v. Nebraska,* 262 U.S. 390, 399-400 (1923). In *Santosky* the Court noted that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or

have lost temporary custody of their child to the State." 455 U.S. at 753. That substantive liberty interest was so significant that it could be terminated only on a clear and convincing rather than a fair preponderance standard of proof. *Id.* at 768-69. In *Quilloin* the Court emphasized that a divorced father such as Prisco had a significant due process interest, greater than that of a father of an illegitimate child, because "legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage." 434 U.S. at 256. In *Stanley* the court held that even the father of an illegitimate child, with whom he had a custodial relationship, had a substantive due process interest which could not be terminated without a hearing. 450 U.S. at 657-58. In light of these authorities, it cannot be seriously suggested that Prisco's substantive interest and procedural entitlement to notice and hearing were doubtful in August of 1983 when Lauren was removed from Philadelphia, and in October of 1983 when she was placed in the Witness Protection Program. What remains for consideration is whether the law was in doubt as applied to those officials who caused her removal.

At the time Lauren was removed from Philadelphia several cases had already addressed the issue presented by such an action. In *Ruffalo v. Civiletti,* 702 F.2d 710 (8th Cir. 1983), decided on March 17, 1983 and rehearing and rehearing in banc denied on June 8, 1983, the facts were similar to those in the instant case, except that a father and son were placed in the Witness Protection Program without notice to the mother. The court held that her constitutional rights had been violated. *Id.* at 715. In *Franz v. United States,* 707 F.2d 582 (D.C. Cir. 1983), decided on May 10, 1983, the court held that a non-custodial parent

has a constitutional right to notice and an opportunity to be heard when his child is placed in the Witness Protection Program. *Id.* at 608. Neither case determined precisely what procedural requirements would suffice, since in both cases, as in Prisco's case, no procedure, either pre- or post-removal, was afforded. Thus at the time of Lauren's removal, two cases respecting the precise rights now claimed to be unclear had already been decided adversely to those responsible for the operation of the Witness Protection Program.

In support of the contention that Prisco's constitutional rights were unclear in August of 1983. Smith relies on *Leonhard v. Mitchell,* 473 F.2d 709 (2d Cir.) (*Leonhard I*), *cert. denied,* 412 U.S. 949 (1973), and *Leonhard v. United States,* 633 F.2d 599 (2d Cir. 1980) (*Leonhard II*). Those cases are not sufficient to support a summary judgment on official immunity grounds. *Leonard I,* which was decided before the Supreme Court's decision in *Santosky,* involved an action by a father seeking a writ of mandamus to the official in charge of the Witness Protection Program to compel disclosure of the location of the children. The appellate court's affirmance was on the ground that there was no basis for mandamus relief. 473 F.2d at 713-14. Dicta to the effect that there is no "clear constitutional right to custody or visitation rights," *id.* at 713, is not only unpersuasive, but plainly inconsistent with *Santosky.* In *Leonhard II* the father's damage claim was held to be time barred, and the children were held to lack standing to complain of an abridgment of his rights. 633 F.2d at 618. Thus the court expressed no view as to the father's rights. By the time Lauren was removed from Philadelphia, *Santosky, Quilloin, Ruffalo* and *Franz* had been decided. In light of those decisions, Smith's contention that Prisco's rights to some form of notice was not clearly established in August or October of 1983 is totally unpersuasive. Thus

we hold that the district court did not err in denying Smith's motion for summary judgment on the defense of qualified official immunity.

IV

The appeal of Edwin Meese and Stanley Morris will be dismissed. The order denying the motion for summary judgment of William French Smith on the ground of qualified official immunity will be affirmed. Although the United States Attorney has addressed other issues, including the legal sufficiency of the pleadings, no other issues may properly be considered in this appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-1708

ANTHONY J. PRISCO, JR., INDIVIDUALLY AND ANTHONY J. PRISCO, JR. AS PARENT AND NATURAL GUARDIAN OF LAUREN PRISCO, A MINOR

v.

UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, ET AL.

SUR PETITION FOR REHEARING

[Filed Aug. 24, 1988]

Present: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for

rehearing is denied. Judge Seitz would grant rehearing in banc because of the appealability issue. He realizes that the evolving state of the law with respect to the parameters of *Mitchell v. Forsyth,* 472 U.S. 511 (1985), can only be finally settled by the Supreme Court. Nevertheless, he believes the particular issue here fully satisfies the criteria for rehearing in banc. Judges Becker, Stapleton, Greenberg and Hutchinson would also grant rehearing.

By the Court,

/s/ JOHN J. GIBBONS
Chief Judge

Dated: Aug. 24, 1988

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 85-6739

ANTHONY J. PRISCO

v.

UNITED STATES OF AMERICA

[Filed Oct. 14, 1987]

ORDER

AND NOW, this 14 day of October, 1987, upon consideration of the summary judgment motion of defendants the United States, the United States Department of Justice, the United States Marshal Service, William French Smith, Edwin Meese, Stanley Morris and "unknown agents of the Marshal Service," and plaintiff Anthony Prisco's response thereto, it is hereby ORDERED that the motion is DENIED. My decision is based on the following:

Plaintiff asserts he was denied his constitutional rights without due process because he was not informed until many months after the fact, that his daughter, along with her mother and Michael Morris, a federal witness, had been taken into the Federal Witness Protection Program, 18 U.S.C. § 3521. He further asserts that the visitation arrangements finally offered by the U.S. Marshal Service fall short of his prior visitation rights and thus the government continues to deprive him of his constitutionally pro-

tected liberty interest in having a relationship with his daughter. *See* U.S. Const. amend. V.

Defendants assert that they have not acted unconstitutionally. Although they recognize that a parent has a liberty interest in the custody of his or her child, *see* Defendants' Motion for Summary Judgement at 14 (citing *Santosky v. Kramer,* 455 U.S. 745 (1982); *Ruffalo v. Civiletti,* 702 F.2d 710 (8th Cir. 1983)), they argue that plaintiff has not been denied a liberty interest sufficient to trigger due process guarantees. It is the government's position that there is no actionable governmental interference arising from plaintiff's daughter's entry into the Witness Protection Program as long as the government provides reasonable opportunity for visitation. Specifically, they contend, the government's visitation program sufficiently meets plaintiff's visitation rights, and thus Anthony Prisco has not been deprived of his constitutional right to visit his daughter.

A party seeking summary judgment must establish the absence of dispute as to material facts, and that he or she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2553 (1986); *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505, 2510 (1986). Moreover, I must examine the facts in the light most favorable to the nonmoving party. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962).

Based on these principles, I find disputed issues of material fact as to whether plaintiff was denied his constitutional rights without due process when his daughter was taken into the Witness Protection Program without his knowledge, and as to whether his rights are still being violated because the government's visitation program does not sufficiently meet plaintiff's visitation rights. There-

fore, defendants are not entitled to judgment as a matter of law.

In addition, defendants Attorney General Meese, former Attorney General William French Smith, and U.S. Marshal Service Director Stanley Morris assert that they are immune from liability in this action, based on *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, (1971), because at the time they acted in August, 1983, their conduct did not violate clearly established constitutional rights of the plaintiff. They say that the law governing plaintiff's claim changed in 1983 based on two decisions recognizing a parent's due process rights when a child participates in the Witness Protection Program. *Ruffalo v. Civiletti,* 702 F.2d 710 (1983); *Franz v. United States,* 707 F.2d 582 (1983). Defendants contend that even assuming *Ruffalo* and *Franz* are correct, constitutional law in this area was not "well established" as of August, 1983, when plaintiff's daughter was placed in the Witness Protection Program.

In response, plaintiff notes that although his daughter was removed from Philadelphia in August, 1983, she was not placed in the program until October, 1983. Thus, by that time, approximately 150 days had passed since the decisions in *Ruffalo* and *Franz.* Plaintiff asserts that because of the relatively few cases contesting the complete removal of children into the program, defendants knew or should have known of the decisions in *Ruffalo* and *Franz* and were on notice that they were likely violating plaintiff's rights.

At the summary judgment stage, I must not weigh evidence and determine the truth of the matter. Instead, I must determine whether there is a genuine issue for trial. *Equimark Comm. Fin. Co. v. C.I.T. Fin. Serv. Corp.,* 812 F.2d 141, 144 (3d Cir. 1987) (citing *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505, 2511 (1986)). Because defendants have not established that the law was truly in a

state of transition such that the *Franz* and *Ruffalo* decisions were insufficient to place defendants on notice that their actions may be violative of plaintiff's rights, I deny summary judgment as to defendants Attorney General Edwin Meese, former Attorney General William French Smith, and U.S. Marshal Service Director Stanley Morris.

Finally, defendant United States claims it is entitled to summary judgment as to plaintiff's claim based on the Federal Tort Claims Act. I deny that motion without prejudice and grant leave to renew the claim at a later date.

/s/ ANTHONY J. SCIRICA
Anthony J. Scirica, J.

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